

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BIOGEN INTERNATIONAL GMBH and
BIOGEN MA, INC.,

Plaintiff,

v.

CIVIL ACTION NO. 1:17cv116
(Judge Keeley)

MYLAN PHARMACEUTICALS, INC.,

Defendant.

SCHEDULING ORDER

On **October 18, 2017**, the parties filed their meeting report and proposed discovery plan. On November 1, 2017, the Court conducted a scheduling conference in this matter and, pursuant to Fed. R. Civ. P. 16(b), Fed. R. Civ. P. 26(f) and the Local Rules of Civil Procedure, as amended on July 20, 2010, **ORDERS** that the following table of dates and deadlines shall govern the further preparation of this case¹:

TABLE OF DATES AND DEADLINES	
INITIAL DISCOVERY DISCLOSURES	November 17, 2017
PLAINTIFF JOIN PARTIES	April 2, 2018
PLAINTIFF AMEND PLEADINGS	July 6, 2018
DEFENDANT JOIN PARTIES	April 2, 2018

¹ As noted in this Court's First Order and Notice Regarding Discovery and Scheduling, the report is considered advisory only. Accordingly, this Court adopts the proposed discovery plan of the parties only to the extent noted.

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DEFENDANT AMEND PLEADINGS	July 6, 2018
JOINT PROTECTIVE ORDER	November 30, 2017
PLAINTIFFS IDENTIFY ACCUSED PRODUCTS AND ASSERTED PATENT(S) THEY ALLEGEDLY INFRINGED	December 1, 2017
DEFENDANT PRODUCE RELEVANT CORE TECHNICAL DOCUMENTS RELATED TO THE ACCUSED PRODUCTS	January 10, 2018
PLAINTIFFS DISCLOSE INITIAL INFRINGEMENT CONTENTION CLAIM CHARTS	February 28, 2018
DEFENDANT DISCLOSE INITIAL INVALIDITY CONTENTIONS AND RELATED DISCLOSURES	March 30, 2018
LAST DATE TO SERVE REQUESTS FOR PRODUCTION TO BE GOVERNED BY SUBSTANTIAL COMPLETION DEADLINE	April 30, 2018
SUBSTANTIAL COMPLETION OF DOCUMENT PRODUCTION	July 30, 2018
OPENING EXPERT REPORTS	November 27, 2018
REBUTTAL EXPERT REPORTS	January 4, 2019
REPLY EXPERT REPORTS	January 18, 2019
COMPLETION OF EXPERT DISCOVERY	March 22, 2019
DAUBERT MOTIONS	April 12, 2019
DAUBERT RESPONSE	May 10, 2019
COMPLETION OF FACT DISCOVERY	October 1, 2018
MARKMAN EVENTS	
PARTIES EXCHANGE LIST OF CLAIM TERM(S)/PHRASE(S) THAT PARTIES BELIEVE NEED CONSTRUCTION	January 22, 2018

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PARTIES EXCHANGE LIST OF PROPOSED CLAIM CONSTRUCTIONS OF TERM(S)/PHRASE(S) ON PARTIES' EXCHANGE LISTS	February 6, 2018
JOINT CLAIM CHART	February 26, 2018
OPENING MARKMAN BRIEFS	March 26, 2018
RESPONSE MARKMAN BRIEFS	April 16, 2018
MARKMAN HEARING	May 11, 2018 9:30 a.m. (3 hours reserved)
DEADLINE FOR PARTIES TO SUPPLEMENT IDENTIFICATION OF ALL ACCUSED PRODUCTS AND OF ALL INVALIDITY CONTENTIONS	September 27, 2019
DISPOSITIVE MOTIONS	August 19, 2019
RESPONSE TO DISPOSITIVE MOTIONS	September 19, 2019
REPLY TO DISPOSITIVE MOTIONS	October 3, 2019
PRETRIAL MEMORANDA	January 15, 2020
PLAINTIFF'S FINAL LIST OF WITNESSES AND EXHIBITS	January 9, 2020
DEFENDANT'S FINAL LIST OF WITNESSES AND EXHIBITS	January 9, 2020
OBJECTIONS TO FINAL LIST OF WITNESSES AND EXHIBITS	January 16, 2020
PLAINTIFF'S INTERROGATORIES AND DEPOSITIONS TO BE USED AT TRIAL	January 9, 2020
DEFENDANT'S INTERROGATORIES AND DEPOSITIONS TO BE USED AT TRIAL	January 9, 2020
OBJECTIONS TO INTERROGATORIES AND DEPOSITIONS	January 16, 2020
STIPULATION OF FACTS	January 16, 2020

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PROPOSED EXPERT WITNESS BIOGRAPHICAL SKETCHES	January 16, 2020
DESIGNATION OF JOINT EXHIBITS	January 16, 2020
PRETRIAL CONFERENCE/FINAL SETTLEMENT CONFERENCE	January 23, 2020 10:00 a.m.
TRIAL DATE	February 3, 2020 9:00 a.m. (first) (7 days)

1. **INITIAL DISCOVERY DISCLOSURES**: Pursuant to the parties' request at the scheduling conference, each party shall provide to every other party the initial discovery disclosures required under Fed. R. Civ. P. 26(a)(1), on or before **November 17, 2017**.

2. **JOINDER AND AMENDMENTS**: Motions to join additional parties by the plaintiff shall be filed by **April 2, 2018**. Motions to amend pleadings, as well as any similar motions, by the plaintiff shall be filed by **July 6, 2018**. Motions to join additional parties by the defendant shall be filed by **April 2, 2018**. Motions to amend pleadings, as well as any similar motions, by the defendant shall be filed by **July 6, 2018**.

3. **INITIAL CONTENTIONS**: The plaintiffs shall identify the accused products and asserted patent(s) allegedly infringed by **December 1, 2017**. Defendant shall produce the relevant core

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technical documents related to the accused products by **January 10, 2018**. Plaintiffs shall disclose their initial infringement contention claim charts by **February 28, 2018**. Defendant shall disclose its initial invalidity contentions and related disclosures by **March 30, 2018**.

4. **PROTECTIVE ORDER:** The parties shall submit their joint proposed protective order to the Court by no later than **November 30, 2017**.

5. **PRODUCTION OF DOCUMENTS:** The parties shall serve all requests for production of documents to be governed by the substantial completion deadline, no later than **April 30, 2018**. The deadline for substantial completion of document production is **July 30, 2018**.

6. **EXPERT REPORTS:** Opening expert reports, as required by Fed. R. Civ. P. 26(B), on issues for which the party bears the burden of proof for that issue shall be made to all other parties, or their counsel, no later than **November 27, 2018**. All rebuttal expert reports shall be made to all other parties, or their counsel, by no later than **January 4, 2019**. All reply expert reports shall be made to all other parties, or their counsel, no later than **January 18, 2019**.

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The disclosures described in Fed. R. Civ. P. 26(a)(2)(B) shall not be required of physicians and other medical providers who examined or treated a party or party's decedent unless the physicians or medical providers will render an expert opinion in the case.

7. **DAUBERT MOTIONS, RESPONSE:** *Daubert* motions shall be filed by **April 12, 2019**. Any such motions must be supported by a memorandum at the time the motion is filed with the Clerk. Response to such motions shall be delivered to the Clerk with copies served upon opposing counsel on or before **May 10, 2019**. No reply to the response shall be filed. If necessary, a hearing on *Daubert* motions will be set by separate order of the Court.

8. **FACT AND EXPERT DISCOVERY:** All fact discovery shall be completed by **October 1, 2018**. All expert discovery shall be completed by **March 22, 2019**. "Completed discovery" as used in Fed. R. Civ. P. 16(b) means that, within the time limits set, all discovery, objections, motions to compel, and all other motions and replies relating to discovery in this civil action have been filed and the party objecting or responding has had sufficient time under the Federal Rules of Civil Procedure to make responses. The term "all discovery" in the preceding definition of "completed

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discovery" includes the disclosures required by Fed. R. Civ. P. 26(a)(1) and (2), but does not include the disclosures required by Fed. R. Civ. P. 26(a)(3).

Parties have a continuing obligation to supplement their responses beyond the discovery cut-off date, as provided in Fed. R. Civ. P. 26(e). The parties should refer to L.R. Civ. P. 5.01, L.R. Civ. P. 26.01 -26.04, L.R. Civ. P. 33.01, L.R. Civ. P. 34.01, L.R. Civ. P. 36.01, and L.R. Civ. P. 37.01 - 37.02 for further instructions on discovery practice.

The conduct of any discovery which would require a later time limit shall be permitted only on the order of the Court or by filed stipulation of the parties, and only in cases that will not be delayed for trial thereby.² The parties should be aware that a stipulation to the continuance of discovery anticipates no discovery disputes and, therefore, this Court will not hear discovery disputes arising during the stipulated continuance.

² Extension of the discovery deadline does not change the other deadlines set forth herein nor shall it be a basis for seeking extension of those deadlines. In particular, the deadline for dispositive motions generally cannot be changed without affecting the trial date. In considering to extend discovery, the parties should give thought as to any possible impact on contemplated dispositive motions.

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9. **LIMITATIONS ON DISCOVERY**: The preemptive limitations on discovery (numbers of interrogatories, requests for admission, and depositions) set out in L.R. Civ. P. 26.01(c) apply to this case unless otherwise stipulated or ordered.

10. **CLAIM CONSTRUCTION ISSUE IDENTIFICATION**: On or before **January 22, 2018**, the parties shall exchange a list of those claim term(s)/phrase(s) that they believe will likely be disputed and require construction. On or before, **February 6, 2018**, the parties shall exchange their proposed claim construction of those term(s)/phrase(s). The parties will meet and confer and prepare a Joint Claim Construction Chart to be filed no later than **February 26, 2018**.

11. **CLAIM CONSTRUCTION BRIEFING / HEARING**: The parties shall file their opening brief on or before **March 26, 2018**. Responsive briefs shall be filed on or before **April 16, 2018**. A hearing on claim construction will be held on **May 11, 2018**, at **9:30 a.m.**, at the **Clarksburg, West Virginia**, point of holding court. The parties shall supplement their identification of all accused products and all invalidity contentions no later than **September 27, 2019**.

12. **DISPOSITIVE MOTIONS**: All dispositive motions, as well as deposition transcripts, admissions, documents, affidavits, and any

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other such matters in support thereof, shall be filed by **August 19, 2019**. Unless parties have obtained an early briefing schedule from the Court, all dispositive motions should be filed after the close of discovery.

Any such motion must be supported by a memorandum at the time the motion is filed with the Clerk. Memoranda in opposition to such motions shall be delivered to the Clerk with copies served upon opposing counsel on or before **September 19, 2019**. Any reply memoranda shall be delivered to the Clerk with copies served upon opposing counsel on or before **October 3, 2019**. All dispositive motions unsupported by memoranda will be denied without prejudice. See L.R. Civ. P. 7.02(a).

Factual assertions made in memoranda should be supported by specific references to affidavits, depositions or other documents made a part of the record before the Court. Copies of the supporting documents, or relevant portions thereof, should be appended to the memoranda. The parties may refer to L.R. Civ. P. 7.02, L.R. Civ. P. 12.02 and L.R. Civ. P. 78.01 for details on motion practice before this Court.

13. **PRETRIAL MEMORANDA**: A pretrial memorandum shall be submitted to the Court not later than **January 15, 2020**. The

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pretrial memorandum shall contain at least those matters provided for under L.R. Civ. P. 16.04(b).

The pretrial memorandum shall contain for each party, a list of all witnesses who will be called at the trial:

- A. Each list of witnesses should include the witnesses' addresses and a statement of the general subject matter of their testimony. It is **NOT** sufficient to designate the witness simply "fact," "medical," or "expert." The list must also include an indication in good faith of those witnesses who **WILL** be called in the absence of reasonable notice to opposing counsel to the contrary and of those witnesses who **MAY** be called.
- B. This restriction does not apply to rebuttal witnesses or documents when necessity cannot be reasonably anticipated. Furthermore, in the case of expert witnesses, counsel shall certify that they have exchanged expert reports or have otherwise exchanged expert information. Expert witnesses whose reports have not been furnished to opposing counsel will not be permitted to testify nor shall experts be permitted to testify to opinions not included in the reports timely furnished.
- C. Except for good cause shown, the Court will not permit any witness to testify unless with respect to such witness there has been complete compliance with all provisions of this Order and prior court orders.

The witness lists submitted to this Court as part of the pretrial memorandum shall include all of a party's potential witnesses and exhibits and no party shall be permitted to add to these lists after the pretrial memorandum is submitted to the Court. Following

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the pretrial conference, this Court shall enter the final pretrial order which shall be modified only to prevent manifest injustice.

14. FINAL LIST OF WITNESSES AND EXHIBITS AND OBJECTIONS:

Pursuant to Fed. R. Civ. P. 26(a)(3), on or before **January 9, 2020**, plaintiff shall file with the Clerk a final list of those exhibits and witnesses that he or she actually intends to use or call at trial. Prior to that, he shall either forward copies of the proposed exhibits or make them available to all other counsel for examination. On or before **January 9, 2020** defendant shall file a list of proposed exhibits to be used and witnesses to be called at trial after having forwarded copies of them or having them available for examination to all other counsel. All exhibits shall be appropriately marked in numerical sequence (not lettered). Exhibit markers may be obtained from the Clerk.

By each of the dates set forth above, each counsel shall tender to the Clerk two sets (preferably in binders and on disk) of copies of the exhibits to be used at trial. These should be indexed for easy reference and each paper exhibit should be individually tabbed. One of the binders will be for the Court's use and the other is for use by the witness. Counsel should have their own copy of each exhibit and should furnish opposing counsel with a

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copy of each exhibit. Original exhibits shall be submitted to the Clerk at trial and should not be tendered to the Clerk prior to trial.

Any objection to any proposed witness or exhibit must be filed in writing no later than **January 16, 2020**, shall include a copy of the exhibit where possible, and shall include authority supporting the ground for objection. Failure to comply with this paragraph may constitute a waiver of objection or may result in the Court's denying any objection to the admission of an affected exhibit or witness.

15. **INTERROGATORIES AND DEPOSITIONS TO BE USED AT TRIAL AND OBJECTIONS**: Pursuant to Fed. R. Civ. P. 26(a)(3), on or before **January 9, 2020**, plaintiff shall file with the Clerk any interrogatories, answers thereto, depositions, etc., specifying the appropriate portions thereto that plaintiff intends to offer in this case. Defendant shall do the same on or before **January 9, 2020**. Before designating these discovery materials, the parties shall meet and agree as to the elimination of all irrelevant and repetitive matter, and all colloquy between counsel in the depositions. In addition, the parties shall, in good faith, attempt to resolve all objections to testimony. Any objections to the

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testimony that cannot be amicably resolved and the grounds for the objections shall be filed in writing by each of the parties no later than **January 16, 2020**, or such objection shall be deemed to have been waived. The objections shall include appropriate statement of authorities in support of the party's position. This paragraph does not apply to discovery materials that will be used at trial solely in cross-examination or for impeachment.

16. **STIPULATION OF FACTS**: Counsel are encouraged to meet and enter into stipulations of facts in this case and any such stipulation shall be reduced to writing, signed by counsel and filed with the Court and with opposing counsel by **January 16, 2020**.

17. **BIOGRAPHICAL SKETCHES**: Biographical sketches of any proposed expert witnesses shall be filed with the Court and with opposing counsel by **January 16, 2020**.

18. **DESIGNATION OF JOINT EXHIBITS**: The parties should consider designating a list of joint exhibits and should file any list of exhibits to be jointly designated by **January 16, 2020**.

19. **PRETRIAL CONFERENCE**: A pretrial conference shall be held at **10:00 a.m.**, on **January 23, 2020**, at **the Clarksburg, West Virginia** point of holding court. Lead trial counsel for each represented party must attend. Counsel and parties should be

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prepared to participate fully and to discuss all aspects of the case, including the matters set forth in the pretrial order. Persons with full authority to settle the case for each party shall be present in person.

20. **TRIAL**: A bench trial in this action shall be held on **February 3, 2020, at 9:00 a.m.**, at the **Clarksburg, West Virginia** point of holding court. This case is presently the **first** case on the trial docket for that week.

21. **SETTLEMENT AUTHORITY AND SANCTIONS**: At least one of the attorneys for each party participating in any conference before trial shall have authority to make decisions as to settlement, stipulations and admissions on all matters that participants reasonably anticipate may be discussed. Counsel and parties are subject to sanctions for failures and lack of preparation specified in Fed. R. Civ. P. 16(f) and L.R. Civ. P. 37.01 respecting pre-trial conferences or orders.

22. **DEADLINES FINAL**: The time limitations set forth above shall not be altered except as set forth in L.R. Civ. P. 16.01(f).

All dates for submissions, deliveries and filings with the Clerk or the Court refer to the date the materials must be actually received not the mailing date.

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FAILURE ON THE PART OF COUNSEL TO APPEAR AT THE PRETRIAL CONFERENCE OR TO COMPLY WITH THE REQUIREMENTS OF THIS ORDER WILL SUBJECT THE PARTY OR ATTORNEY TO APPROPRIATE SANCTIONS UNDER THE RULES, AND MAY RESULT IN DISMISSAL OR STRIKING OF ALL PLEADINGS OF THE FAILING PARTY OR PERSON. COMPLIANCE WITH THIS ORDER INCLUDES *TIMELY AND GOOD FAITH EFFORT* BY ALL PARTIES TO MEET AND *JOINTLY* PREPARE THE FINAL PRETRIAL ORDER AND OTHER ITEMS DESCRIBED ABOVE.

It is so ORDERED.

The Court directs the Clerk to transmit copies of this Scheduling Order to counsel of record.

DATED: November 6, 2017

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE